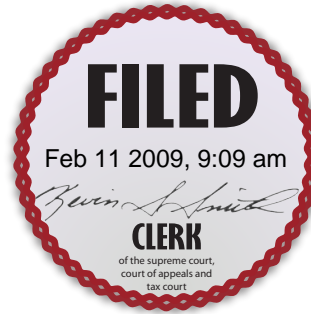


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

KEYONE JOHNSON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-0807-CR-417
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0712-FB-261820

February 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Keyone Johnson appeals his conviction for neglect of a dependent as a class B felony.¹

We affirm.

ISSUES

1. Whether there is sufficient evidence to support the conviction.
2. Whether the jury's guilty verdict for neglect of a dependent and a not guilty verdict for unlawful possession of a firearm by a serious violent felon are inconsistent.

FACTS

On November 18, 2007, Johnson was at 2308 Larnie Lane in Indianapolis with his then-six-year-old son, K.J. Johnson had three other children, including two with Erica Meredith ("Erica"). Erica had left K.J. and his siblings in Johnson's care for the night. K.J. was in "Big Erica[]" and "daddy's" bedroom, watching movies. (Tr. 59). At some point during the evening, he stood on the bed and discovered a handgun on top of the bed's headboard. He pushed a button, which ejected the clip. He then pointed the gun at his left hand and shot himself through his hand.

After he shot himself, K.J. went into the living room to get Johnson. Johnson took K.J. to the home of K.J.'s mother and grandmother. K.J.'s mother then took him to the hospital.

Indianapolis Metropolitan Police Detective Genae Gehring was assigned to K.J.'s case on November 19, 2007. K.J.'s mother could not tell Detective Gehring the address

¹ Ind. Code § 35-46-1-4.

of the home where K.J. had shot himself. K.J. also did not know the address or location of the house and could only tell Detective Gehring that the shooting had occurred “at Big Erica’s and daddy’s house” (Tr. 135). He was able to provide Detective Gehring with Erica’s cell phone number. Erica, however, refused to give Detective Gehring her address or any identifying information, including her last name. Eventually, K.J.’s grandmother informed Detective Gehring of Erica’s last name. Detective Gehring then contacted Child Protective Services, from which she obtained Erica’s address. K.J. subsequently identified that residence as where the shooting had taken place. Detective Gehring executed a search warrant for the residence but did not locate a gun.

On December 11, 2007, the State charged Johnson with Count I, class B felony neglect of a dependent; and Count II, unlawful possession of a firearm by a serious violent felon, a class B felony. The trial court commenced a bifurcated jury trial on June 23, 2008.

During the first phase, Erica testified that she returned home in the early morning of November 19, 2007. When she went into the bedroom, she discovered “[t]he hole in the wall and the bed,” as well as blood “[n]ext to the hole.” (Tr. 103). According to her testimony, however, she did not find a gun. She also testified that she did not keep a gun in the house and that Johnson did not live at 2308 Larnie Lane.

Johnson testified that on November 18, 2007, he resided at 724 East 24th Street in Indianapolis. According to Johnson, he had lived with Erica at 2308 Larnie Lane, but they had “just been kind of separated for a minute.” (Tr. 213). He further testified that he did not have a gun that weekend and did not go into the bedroom on the day of the

shooting. During the second phase of the trial, Johnson stipulated that he had been convicted of robbery as a class C felony in 1996.

The jury found Johnson guilty of neglect of a dependent as a class B felony but not guilty of unlawful possession of a firearm by a serious violent felon. On July 11, 2008, the trial court sentenced Johnson to fifteen years with three years suspended.

DECISION

1. Sufficiency of the Evidence

Johnson asserts that the evidence was insufficient to sustain his conviction for neglect of a dependent.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

Pursuant to Indiana Code section 35-46-1-4(a)(2), a person having the care of a dependent who knowingly or intentionally places the dependent in a situation resulting in serious bodily injury commits class B felony neglect of a dependent. Here, the State charged Johnson with “knowingly plac[ing] [K.J.] in a situation that did endanger the life

or health of [K.J.], that is: allowed the child access to a loaded firearm, which resulted in serious bodily injury to [K.J.]” (App. 18) (emphasis omitted).

Indiana Code section 35-41-2-2(b) provides that “[a] person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” Within the context of Indiana Code section 35-46-1-4(a)(2) this “requires subjective awareness of a ‘high probability’ that a dependent has been placed in a dangerous situation, not just any probability.” *Scruggs v. State*, 883 N.E.2d 189, 191 (Ind. Ct. App. 2008) (quoting *Gross v. State*, 817 N.E.2d 306, 309 (Ind. Ct. App. 2004)), *trans. denied*. “Because such a finding requires one to resort to inferential reasoning to ascertain the defendant’s mental state, the appellate courts must look to all the surrounding circumstances of a case to determine if a guilty verdict is proper.” *Id.* (quoting *McMichael v. State*, 471 N.E.2d 726, 731 (Ind. Ct. App. 1984), *trans. denied*).

Johnson contends that “there was no direct evidence and very little circumstantial evidence to support a finding that he knew the gun was there and loaded.” Johnson’s Br. at 4. Specifically, he argues that the State failed to prove that Johnson lived at 2308 Larnie Lane; therefore, it failed to show that Johnson could have knowingly exposed K.J. to a gun.

In support, Johnson cites to testimony by K.J., including that “his father had not spent the night at the residence that weekend[.]” Johnson’s Br. at 7. Johnson, however, misstates K.J.’s testimony. K.J. only testified that Johnson was not at the home “[t]he night before [he] shot [him]self[.]” (Tr. 76). As to whether Johnson had just arrived on the day K.J. shot himself, [K.J.] testified, “I don’t know.” (Tr. 77). As to K.J. “us[ing]

the term ‘used to live’ when discussing showing the house to [Detective Gehring],” (Johnson’s Br. at 7), he did not testify that Johnson “[u]sed to live in” that house. (Tr. 66).

Johnson also argues that K.J. “acknowledged that he had been to ‘the other house’, where Johnson was living on November 18, 2007” Johnson’s Br. at 7. Again, this misconstrues K.J.’s testimony. Upon cross-examination, Johnson’s counsel asked K.J. whether he remembered a house on 24th Street and whether he had “been to the other house with [his] father[.]” (Tr. 79). K.J. replied in the affirmative. K.J. did not identify the house as his father’s residence.

Johnson further cites to Erica’s testimony that Johnson did not reside with her. Without objection, however, Detective Gehring testified that K.J. had told her that the shooting had occurred “at Big Erica’s and daddy’s house[.]” (Tr. 135). Furthermore, K.J. testified that the shooting had taken place in “Big Erica[.]” and “daddy’s” bedroom, where he and his siblings watched movies. (Tr. 59). The jury clearly rejected the testimony given by Erica—who initially refused to cooperate with the police in their investigation—and instead chose to credit K.J.’s testimony. Johnson’s argument is nothing more than an invitation to judge the credibility of the witnesses, which we decline to do. *See Drane*, 867 N.E.2d at 146. The facts presented at trial support a reasonable inference that Johnson was aware of a high probability that K.J. would have access to the loaded gun in the bedroom.

2. Inconsistent Verdicts

Johnson also asserts that the jury's verdicts require reversal. Specifically, he argues that the jury's acquittal on the possession charge supports his "argument that the State failed to prove that he knowingly allowed [K.J.] access to a loaded gun." Johnson's Br. at 9.

Verdicts may be so extremely contradictory and irreconcilable as to require corrective action. Ordinarily where the trial of one defendant results in acquittal upon some charges and convictions on others, the results will survive a claim of inconsistency where the evidence is sufficient to support the convictions. In resolving such a claim, the court will not engage in speculation about the jury's thought processes or motivation. However, the legal avenue remains open for the claim that there is an inconsistency which renders the result of the trial irrational. Each count of a multi-count indictment or information is regarded as a separate indictment or information. For purposes of trial, each count is treated and measured separately, and a defendant may be found guilty or acquitted on one or more or all of several charges.

Cleasant v. State, 779 N.E.2d 1260, 1263 (Ind. Ct. App. 2002) (internal citations omitted). As we have concluded that there was sufficient evidence to support the neglect of a dependent conviction, we may sustain the jury's verdict. *See id.*

Indiana Code section 35-47-4-5 provides that "[a] serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession by a serious violent felon[.]"

This court has long recognized that a conviction for possession of contraband may be founded upon actual or constructive possession. Constructive possession is established by showing that the defendant has the intent and capability to maintain dominion and control over the contraband.

In cases where the accused has exclusive possession of the premises on which the contraband is found, an inference is permitted that he or she knew of the presence of contraband and was capable of controlling it. However, when possession of the premises is non-exclusive, the inference

is not permitted absent some additional circumstances indicating knowledge of the presence of the contraband and the ability to control it. Among the recognized “additional circumstances” are: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the contraband; (5) contraband is in plain view; and (6) location of the contraband is in close proximity to items owned by the defendant.

Holmes v. State, 785 N.E.2d 658, 660-61 (Ind. Ct. App. 2003) (citations omitted).

In its opening statement during the second phase of the trial, the State asserted that the jury may “consider all that evidence that you’ve already considered in deciding whether the defendant possessed the handgun or not, meaning did -- was he able to get that gun, pick up that gun, use that gun if he wanted to?” (Tr. 298). During its closing statement, the State reiterated that the jury should determine whether Johnson “had possession of that gun, whether he was able to control it, whether he was able to get it when he wanted to. That’s the simple definition of ‘possession’.” (Tr. 303). The trial court did not instruct the jury on the definition of “constructive possession.”

Again, “we will not engage in speculation about the jury’s thought processes or motivation.” *Cleasant*, 779 N.E.2d at 1264. The jury found that Johnson knowingly allowed K.J. access to a loaded gun. We cannot say that this is inconsistent with finding that Johnson did not possess the gun. Accordingly, Johnson has failed to demonstrate that the jury’s verdicts are so extremely contradictory and irreconcilable as to require reversal.

Affirmed.

RILEY, J., and VAIDIK, J., concur.